Filed 5/10/10 P. v. Maule and Herrera CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBBY LEE MAULE and RAUL HERRERA,

Defendants and Appellants.

F057094 & F057096

(Super. Ct. Nos. SUF29898A & SUF29898B)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Brian L. McCabe, Judge.

David Y. Stanley, under appointment by the Court of Appeal, for Defendant and Appellant Robby Lee Maule.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant Raul Herrera.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Catherine Tennant Nieto, Deputy Attorneys General, for Plaintiff and Respondent.

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At a party in Merced, members of two Merced subsets of the Norteño criminal street gang exchanged gang taunts with members of the West Coast Outlaws, an Atwater criminal street gang with ties to neither Norteños nor Sureños. Afterward, two Norteños, Robby Lee Maule and Raul Herrera, confronted members of the West Coast Outlaws in a garage off a nearby alley. As Herrera stood behind him, Maule fired two shots into the garage. Korey Suttles, a member of the West Coast Outlaws, died of a gunshot wound.

A jury found Maule and Herrera guilty of second degree murder and of active participation in a criminal street gang and, as to the murder, found firearm and criminal street gang allegations true. At issue on appeal are several challenges to gang evidence and sentencing. We modify both sentences but otherwise affirm the judgments.

BACKGROUND

On January 30, 2006, an information charged Maule and Herrera with willful, deliberate, and premeditated murder (count 1; Pen. Code, § 187, subd. (a))[1] and with active participation in a criminal street gang (count 2; § 186.22, subd. (a)). As to the murder, the information alleged Maule intentionally and personally discharged a firearm (§ 12022.53, subd. (d)), Herrera was a principal in the commission of the crime in which a principal intentionally and personally discharged a firearm (§ 12022.53, subds. (d), (e)), Maule personally used a firearm (§ 12022.5, subd. (a)(1)), and Maule and Herrera committed the crime for the benefit of a criminal street gang (§ 186.22, subd. (b)). On October 30, 2008, a jury found Maule and Herrera not guilty of first degree murder, guilty of second degree murder, and guilty of active participation in a criminal street gang and found all of the allegations true.

On January 23, 2009, the court sentenced Maule to an aggregate term of three years plus 55 years to life consisting of a 15-to-life term for second degree murder (§ 190, subd. (a)), a 25-to-life enhancement for intentional and personal discharge of a

[1] Later statutory references are to the Penal Code unless otherwise noted.

firearm (§ 12022.53, subd. (d)), a 10-year enhancement for personal use of a firearm (§ 12022.5, subd. (a)(1)) stayed (§ 654), a 15-to-life criminal street gang enhancement (purportedly on the authority of § 186.22, subd. (b)(5)), and a consecutive three-year term for commission of the crime for the benefit of a criminal street gang (§ 186.22, subd. (a)). Congruently, the court sentenced Herrera to an aggregate term of three years plus 55 years to life consisting of a 15-to-life term for second degree murder (§ 190, subd. (a)), a 25-to-life enhancement for intentional and personal discharge of a firearm by a principal (§ 12022.53, subds. (d), (e)), a 15-to-life criminal street gang enhancement (purportedly on the authority of § 186.22, subd. (b)(5)), and a consecutive three-year term for commission of the crime for the benefit of a criminal street gang (§ 186.22, subd. (a)).

ISSUES ON APPEAL

In four challenges to the gang evidence, Maule and Herrera argue (1) insufficiency of the evidence of the criminal street gang enhancements, (2) tainted deliberations on the murder due to the gang expert's improper opinion about specific intent, (3) improper limitation of cross-examination of the gang expert, and (4) improper rebuttal of defense evidence by a gang suppression officer.

Additionally, two challenges to the sentencing are before us. Herrera alone argues (5) improper imposition of a 25-to-life enhancement for intentional and personal discharge of a firearm by a principal. Maule and Herrera argue (6) improper imposition of 15-to-life criminal street gang enhancements.[2]

DISCUSSION

1. Sufficiency of the Evidence

Maule and Herrera argue an insufficiency of the evidence of the criminal street gang enhancements. The Attorney General argues the contrary.

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[2] In all but the penultimate issue, Maule and Herrera join in each other's arguments. (Cal. Rules of Court, rule 8.200(a)(5).)

The parties agree that the insufficiency of the evidence issue centers on the gang expert's testimony, over defense objection, about commission of the charged crimes with a specific intent to promote criminal gang activity:

"[PROSECUTOR]: Let me give you a hypothetical. Let's assume the following facts: There is a party. Two members of Norteño gangs are there. There's some kind of contact between them and a group of people from another gang, and one of those individuals throws up something that the Norteños believe is a '3' and contact is made. And someone says, 'what are you throwing up? Are you throwing up a '3'?'

"That confrontation ends, and then there's some disagreement inside where the two individuals are and a question about disrespect comes up and other people are arguing. They're asked to leave. And as they leave, there's back and forth with other members of the other gang that are saying their gang name to these two people. And at one point, one of the individuals says something to the effect, 'we'll be back.' And then a couple of hours later, there's a gang shooting that's done, and those two individuals are picked out as the people that did it.

"Assuming that those facts are true, do you have an opinion as to whether the crime was committed at the direction of, in association with, or for the benefit of a particular group or gang?

"[GANG EXPERT:] A. Yes, sir, I do.

"[PROSECUTOR"] Q. And what is your opinion?

"[GANG EXPERT:] A. My opinion would be that that was for the direct benefit of that criminal street gang.

"[PROSECUTOR:] Q. And your basis for that?

"[GANG EXPERT:] A. Based upon my training and experience in investigations in regards to related gang violence, that would – that's a typical result of gang violence in our community.

"[PROSECUTOR:] Q. And in your opinion, was the crime committed under those facts with a specific intent to promote criminal gang activity?

"[GANG EXPERT:] A. Yes, it was."

After overruling both a defense objection and a defense motion to strike on the ground that the question called for "speculation and a conclusion by the jury," the court permitted the prosecutor to continue questioning the gang expert:

"[PROSECUTOR:] Q. And your basis for that?

"[GANG EXPERT:] A. The basis, again, is on my training and experience in gang investigations. This is, again, what gang members do. They have a very violent life. They do attack rivals. Anybody that interferes with them, violence is a way that they control. Through that violence, they cause fear and intimidation. People don't necessarily want to testify or come forward and cooperate with law enforcement. It makes it easier for them to commit crimes. It also aid[]s them in the recruitment of other gang members."

Maule and Herrera argue that, apart from the gang expert's testimony, nothing in the record shows "a specific intent to promote, further or assist in criminal conduct by gang members through such conduct as admissions, desire for revenge against a rival gang, the sale of drugs, or evidence of a retaliatory drive-by shooting was planned." The gang expert's testimony, they argue, "was an ipso facto opinion that this homicide was committed because Mr. Maule and Mr. Herrera intended to promote, further or assist in gang criminal conduct."

The Attorney General apparently concedes as much. He responds to each of Maule and Herrera's other arguments but simply ignores the gang expert's specific intent testimony at the heart of their insufficiency of the evidence argument. (Cf. *People v. Bouzas* (1991) 53 Cal.3d 467, 480.) In passing, he cites four cases as authority for the general rule that specific intent "can be proved by evidence that defendant's own criminal conduct was gang related" or by evidence that defendant's intent was "to help [a fellow gang member] commit a crime." (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322; *People v. Hill* (2006) 142 Cal.App.4th 770, 774; *People v. Romero* (2006) 140 Cal.App.4th 15, 20; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1179.) The testimony of a gang expert that the crime was committed with a specific intent to promote criminal gang activity was not at issue in any of those cases, however. The rule is settled that cases are not authority for matters not considered. (*People v. Stone* (2009) 46 Cal.4th 131, 140.)

To prove the element of "specific intent to promote, further, or assist in any criminal conduct by gang members" in a criminal street gang enhancement (§ 186.22, subd. (b)(1)), a gang expert may testify about a range of topics like "'the "culture and habits" of criminal street gangs, including testimony about the size, composition or existence of a gang, gang turf or territory, an individual defendant's membership in, or association with, a gang, the primary activities of a specific gang, motivation for a particular crime, generally retaliation or intimidation, whether and how a crime was committed to benefit or promote a gang, rivalries between gangs, gang-related tattoos, gang graffiti and hand signs, and gang colors or attire.'" (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1197, citations omitted (*Frank S.*); *People v. Killebrew* (2002) 103 Cal.App.4th 644, 656-657 (*Killebrew*).) A gang expert may *not* testify, however, to whether "a specific individual possessed a specific intent." (*Frank S., supra,* at p. 1197; *Killebrew, supra,* at pp. 657-658.)

Here, the gang expert's testimony about specific intent – the only evidence the prosecutor offered on that issue – "simply informed the jury of how he felt the case should be resolved. This was an improper opinion and could not provide substantial evidence to support the jury's finding." (*People v. Ramon* (2009) 175 Cal.App.4th 843, 851.) His "improper opinion on the ultimate issue" was inadmissible. (*Killebrew*, *supra*, 103 Cal.App.4th at p. 658.)

So the Attorney General seeks shelter in other gang evidence. At a party not long before the fatal shooting, Maule and Herrera introduced themselves by name and gang affiliation. Maule said he was from "NFL" (a reference to the "Norteños for Life" subset of the Norteño criminal street gang). Herrera said he was from Dead-End (a reference to the "Dead-End Locs" subset of the Norteño criminal street gang). Gang members commonly introduced themselves in that way. Several people at the party, including Suttles, were members of the West Coast Outlaws, a group the police refer to as a gang but another member refers to as "a bunch of buddies that grew up with each other," "drank together," and "partied together."

After one of the West Coast Outlaw members at the party threw both of his hands up in the air during a song with lyrics about "east side, west side, south side, north side," Maule or Herrera asked him if he was, or if he threw up, a "3" (a sign of the Sureño criminal street gang). He replied in the negative and said that his brother was a Norteño and that no scraps (a pejorative word for Sureños) were at the party.

The Attorney General argues that a "3," "the sign of their hated rival," the Sureño gang, "would have gotten [Maule's and Herrera's] 'machismo' going." The gang expert testified that throwing up a "3" could get a Norteño's machismo going. A witness heard Maule say, "Let me get a gun. These fools are messing with me." Tensions grew as partygoers hurled gang taunts at Maule and Herrera ("Outlaw"), as Maule and Herrera replied in like manner ("NFL" and "Dead-End," respectively), and as Maule or Herrera said, "We'll be back."

"True to their word," the Attorney General summarizes, "[Maule] and Herrera returned armed with a loaded gun later that night, and [Maule] indiscriminately fired at persons he perceived as belonging to the West Coast Outlaws gang. His violent act resulted in the murder of a person he had never met before." Our duty on a claim of insufficiency of the evidence is to examine the whole record in the light most favorable to the judgment below for substantial evidence – that is, credible and reasonable evidence of solid value – on which a reasonable trier of fact could have found the criminal street gang allegation true beyond a reasonable doubt. (*Killebrew, supra,* 103 Cal.App.4th at p. 660.) In the discharge of that duty, we focus on the whole record, not isolated bits of evidence, and presume the existence of every fact the trier of fact could reasonably deduce from the evidence in support of the verdict. (*Id.*)

Shorn of the gang expert's improper opinion on the ultimate issue, the record still contains substantial evidence of the requisite "specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) We reject Maule's and Herrera's argument to the contrary. (*People v. Staten* (2000) 24 Cal.4th 434, 460, citing *Jackson v. Virginia* (1979) 443 U.S. 307, 319.)

2. Deliberations on the Murder

Maule and Herrera argue the gang expert's improper opinion about specific intent tainted deliberations on the murder. The Attorney General argues the contrary.

The crux of Maule's and Herrera's argument is that "the identity of the people involved" in the shooting was "the pivotal issue in the case" and that "the prosecution's case was not sufficiently strong to inspire confidence beyond a reasonable doubt" that the error in admitting the gang expert's opinion on specific intent "did not contribute to the murder verdict[s]." The jury's duty was to consider the evidence of the identity of the people involved in the shooting on the murder charges and on the criminal street gang allegations alike. Our duty is not to reweigh the evidence, on the theory that the evidence

was close, to determine whether the jury should have reached different verdicts. (*People v. Prince* (2007) 40 Cal.4th 1179, 1281.) In essence, Maule's and Herrera's argument simply asks us to reweigh the facts. That we cannot do. (*People v. Bolin* (1998) 18 Cal.4th 297, 331-333.)

3. Cross-examination of the Gang Expert

Maule and Herrera argue improper limitation of cross-examination of the gang expert. The Attorney General argues the contrary.

Shortly before the ruling at issue, the gang expert opined that Maule and Herrera were members of Merced subsets (NFL and Dead-End Locs, respectively) of the Norteño criminal street gang, that the West Coast Outlaws were an Atwater criminal street gang with neither a Norteño nor a Sureño affiliation, and that A-Town was a criminal street gang in Atwater, which was predominantly Sureño territory. At that point, Maule and Herrera sought to ask the gang expert about "the domination of A-Town in Atwater" and the growth of the West Coast Outlaws "in an area dominated by Sureños" and whether West Coast Outlaws and Norteños could safely socialize at a party.

The court denied the defense request, observing that "not even a scintilla" of evidence was in the record showing Sureño involvement. "We've heard nobody testify to that. That is a straw-man theory," the court elaborated. "It does not pass the Evidence Code Section 352 test. I think it's going to be confusing and misleading to the jury." To clarify the scope of permissible questioning, the court, citing *People v. Gardeley* (1996) 14 Cal.4th 605, emphasized the right of the defense to question the gang expert "about a variety of things which are both hearsay and inadmissible that affect [his] opinion." Asked by defense counsel if the ruling precluded asking the gang expert about A-Town, the court replied in the affirmative. Asked by the court if the rule precluded asking the gang expert about Norteño use of the "w" symbol, the court replied in the negative. "I think [the gang expert] can hold his own and testify regarding his expertise regarding the

Norteños and West Coast Outlaws based on his limited information with that Atwater group," the court elaborated.

After the jury's verdicts, Maule and Herrera sought a new trial on the ground of, inter alia, "the erroneous exclusion of evidence involving testimony by [the gang expert] regarding the dominant territorial street gang in Atwater." The crux of the argument was that the admission of that evidence at Maule's and Herrera's first trial, which ended in a hung jury, "could have raised a reasonable doubt in the minds of one, some or all of the jurors regarding the culpability of two Norteño gang members for a crime that really could have been the result of a territorial dispute between a dominant street gang A-Town and a nascent criminal street gang West Coast Outlaws."

Opposing the new trial motion, the prosecutor argued that there was "no evidence or offer of proof as to the A-Town Street Gang as to anything other than they were a gang in Atwater" and "no evidence or offer of proof connecting them in anyway [*sic*] to the murder of Korey Suttles." Contrasting the proposed evidence, which "would have merely shown that members of a rival gang *may* have had the motive to commit the crime," and the evidence at trial, which "connected the defendants to the shooting," the court denied the motion. Noting the absence of a relevant offer of proof, the court's written ruling observed that the proposed cross-examination of the gang expert "would not have identified a possible suspect other than defendants, nor would it have linked any third person to the commission of the crime," and "would not have established an actual motive, but only a possible or potential motive for the murder."

So as not to confuse the issues, and so as not to allow only marginally relevant interrogation, a court retains wide latitude to order reasonable limits on cross-examination without running afoul of the Confrontation Clause. (*People v. Ledesma* (2006) 39 Cal.4th 641, 705, citing *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679-680.) Maule and Herrera contrast the admission of gang evidence at the first trial with the exclusion of gang evidence from the second trial but cite to neither a stipulation in the

record making the rulings at the first trial binding at the second trial nor to any authority, in the absence of such a stipulation, requiring that result. (*People v. Friend* (2009) 47 Cal.4th 1, 63.)

Since a court has broad discretion in ruling on a motion for a new trial and a strong presumption exists that a court properly exercises that discretion, a reviewing court will not disturb the ruling on appeal unless a manifest and unmistakable abuse of discretion clearly appears. (*People v. Davis* (1995) 10 Cal.4th 463, 524.) Exclusion of evidence that produces only speculative inferences is not an abuse of discretion. (*People v. Babbitt* (1988) 45 Cal.3d 660, 684 (*Babbitt*).) Our review of the record satisfies us there was neither an abuse of discretion nor, since the threshold constitutional requirements of relevance and materiality were not satisfied, a due process violation, either. (*Babbitt, supra,* 45 Cal.3d at pp. 684-685, citing *Washington v. Texas* (1967) 388 U.S. 14, 23.)

4. Rebuttal by the Gang Suppression Officer

Maule and Herrera argue improper rebuttal of defense evidence by a gang suppression officer. The Attorney General argues the contrary.

The issue originates with Stephanie Harris's testimony for the defense that Angelica Mercado, her best friend and Maule's cousin's former wife, lived by herself, that Maule's cousin lived with his mother, and that Mercado and Maule's cousin no longer lived together, not even occasionally. Over defense objection, the court permitted a gang suppression officer to testify on rebuttal that, late at night on the day Harris testified, officers conducting a parole and probation sweep of Maule's cousin's residence found him wearing a pair of shorts, with no shirt, and found Mercado, lying on a mattress in the bedroom, wearing a T-shirt and pajama bottoms. (Evid. Code, § 352.)

The crux of Maule's and Herrera's argument is that the rebuttal evidence "related to facts wholly outside Harris'[s] knowledge" and "had little, if any, tendency in reason

to prove that she testified untruthfully." To the contrary, the court's ruling permitted the prosecutor "to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." (*Davis v. Alaska* (1974) 415 U.S. 308, 318.) By contradicting Harris's testimony, the rebuttal evidence tended to show she had a bias to testify in Maule's favor. That, of course, was relevant to the jury's assessment of her credibility in testifying she heard some *other* young male discuss the accidental killing of a best friend in the garage over "something stupid" for which "two guys caught the rap." Maule and Herrera complain, too, that the gang suppression officer's testimony prejudicially identified Maule's cousin as a Norteño, but in light of the abundant evidence of Maule's and Herrera's own criminal street gang affiliations the complaint is specious.

The admission of rebuttal evidence rests largely within the sound discretion of the trial court and will not be disturbed on appeal in the absence of a showing of a palpable abuse of discretion. (*People v. Smith* (2005) 35 Cal.4th 334, 359.) Maule and Herrera fail to make the requisite showing. The prejudice that Evidence Code section 352 seeks to avoid is not the damage to a defense that naturally flows from probative evidence. (*People v. Karis* (1988) 46 Cal.3d 612, 638.) "Rather, the statute uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors." (*People v. Farmer* (1989) 47 Cal.3d 888, 912, overruled on another ground by *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.) A due process violation can arise from the admission of evidence, whether or not compliant with state law, only on a showing that the ruling made the trial fundamentally unfair. (*People v. Partida* (2005) 37 Cal.4th 428, 432.) Again, Maule and Herrera fail to make the requisite showing.

5. Firearm Discharge Enhancement

Herrera argues that the law does not authorize imposition of a 25-to-life enhancement for intentional and personal discharge of a firearm by a principal. The Attorney General argues the contrary.

The foundation of Herrera's argument is our Supreme Court's holdings that "the Legislature's use of the term 'enhancement' in section 12022.53(e)(2) was intended to refer broadly to any greater term of imprisonment for a crime that, as here, is committed to benefit a criminal street gang" so "that, as used in the statute, the word 'enhancement' includes not only the sentence enhancements in section 186.22 , but also the alternate penalty provisions in that section." (*People v. Brookfield* (2009) 47 Cal.4th 583, 593 (*Brookfield*).) Emphasizing *Brookfield*'s acknowledgment of the Legislature's distinction between "those who personally used firearms in gang-related felonies, and those who were merely accomplices to such offenses," he argues that the only possible remedy here is striking the 25-to-life enhancement for intentional and personal discharge of a firearm by a principal. (*Id.* at p. 594.) Otherwise, he concludes, "his sentence would bear the severity of that received by the shooter – a result not permitted by *Brookfield*."

Quoting *Brookfield*, the Attorney General argues to the contrary that, as an "*accomplice* to a gang-related offense specified in section 12022.53" in which not he but "another principal personally used and discharged a firearm," Herrera is "subject to additional punishment under *either* section 12022.53 *or* the gang-related sentence increases under section 186.22, but not *both*." (*Brookfield, supra,* 47 Cal.4th at pp. 593-594, italics in original.) Either way, his sentence would *not* bear the severity of Maule's.

In *People v. Gonzalez* (2010) 180 Cal.App.4th 1420, an opinion filed after briefing here was complete, an analogous sentence was at issue. On a guilty verdict of attempted willful, deliberate, and premeditated murder with true findings of intentional and personal discharge of a firearm by a principal (§ 12022.53, subds. (c), (d), (e)) and commission of the crime for the benefit of a criminal street gang (§ 186.22, subd. (b)), the court imposed

both an enhancement for intentional and personal discharge of a firearm by a principal *and* a criminal street gang enhancement to the life without the possibility of parole sentence for the attempted murder. (*Gonzalez, supra,* at pp. 1423-1424.) Noting the holdings in *Brookfield* that "the word 'enhancement' in section 12022.53(e)(2) refers to both the sentence enhancements in section 186.22 *and* the penalty provisions in that statute" and that section 12022.53 bars the court from imposing *both* enhancements, *Gonzalez* struck the criminal street gang enhancement from the sentence. (*Gonzalez, supra,* at p. 1427.) So do we. The customary parole eligibility period of seven years for Herrera's 15-to-life term for second degree murder applies. (§ 3046, subds. (a)(1), (b).)

6. Criminal Street Gang Enhancements

Maule and Herrera argue, the Attorney General agrees, and we concur that section 186.22, subdivision (b)(5) mandates a 15-year minimum parole eligibility date but does not authorize a 15-to-life enhancement. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1009; *People v. Johnson* (2003) 109 Cal.App.4th 1230, 1239; cf. 186.22, subd. (b)(5).) Our striking of the criminal street gang enhancement from Herrera's sentence moots a remedy as to him alone. (*Ante,* part 5.) (§ 186.22, subd. (b)(5).)[3]

DISPOSITION

The matter is remanded with the directions to the court:

- To issue amended abstract of judgments reflecting (1) the striking of the purported 15-to-life criminal street gang enhancement (§ 186.22, subd. (b)(5)) from Maule's and Herrera's sentences; (2) the ordering of a 15-year minimum parole eligibility date for Maule's 15-to-life term for second degree murder (§ 186.22, subd. (b)(5)); (3) the ordering of a seven-year minimum parole eligibility date for Herrera's 15-to-life

[3] Both abstracts of judgment order service of the determinate term (commission of the crime for the benefit of a criminal street gang) consecutively to the indeterminate term (second degree murder), but, as Maule's briefing points out, the law requires the opposite. (§ 669; Cal. Rules of Court, rule 4.451(a).)

term for second degree murder (§ 3046, subds. (a)(1), (b)); and (4) the service by both Maule and Herrera of the indeterminate terms (second degree murder) consecutively to service of the determinate terms (commission of the crime for the benefit of a criminal street gang) (§ 669; Cal. Rules of Court, rule 4.451(a)); and

•To send to the Department of Corrections and Rehabilitation certified copies of both abstracts of judgment so amended.

Maule and Herrera have no right to be present at those proceedings. (See *People v. Price* (1991) 1 Cal.4th 324, 407-408.) In all other respects, the judgments are affirmed.

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Gomes, J.

WE CONCUR:

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Cornell, Acting P.J.

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Kane, J.